IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

In re:

RICHARD WALTER RAJOTTE, aka
Rick Rajotte Ind. & fdba Chemex
Tennessee Center

Debtor

Case No. 87-06579-KL3-7
Chapter 7

WILLIAM T. CARTER and MARJORIE
CARTER RAJOTTE

Plaintiffs

v.

RICHARD WALTER RAJOTTE

Defendant

Adversary Proceeding
No. 399-0200A

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Appearances: Robert J. Mendes, Mendes & Gonzales, PLLC, Nashville, Tennessee, Attorney for Plaintiffs

James D. R. Roberts, Jr., Roberts & O'Brien, PLLP, Nashville, Tennessee, Attorney for Defendant

HONORABLE R. THOMAS STINNETT,
UNITED STATES BANKRUPTCY JUDGE

The court held a hearing on some of the issues in this adversary proceeding, and at the conclusion of the hearing, the court made oral findings of fact and conclusions of law. The court, however, has never entered a judgment in accordance with those findings and conclusions. Having considered the matter further, the court has come to believe that its legal conclusions were not entirely correct. Since the court has not entered a judgment, it can revise its earlier opinion. *Zucker v. Maxicare Health Plans, Inc.*, 14 F.3d 477 (9th Cir. 1984); *SLA Property Management v. Angelina Cas. Co.*, 856 F.2d 69 (8th Cir. 1988); *In re Meri Borelli Associates, Inc.*, 238 B.R. 22 (S. D. N. Y. 1999); *Fed. R. Bankr. P.* 9021 & 5003; *Fed. R. Civ. P.* 58.

The oral opinion was not final for another reason. It did not decide all of the issues. The court left the issue of damages to be decided after a later hearing, including the question of attorney's fees as damages, not as costs. *Fed. R. Bankr. P.* 7054(a); *Fed. R. Civ. P.* 54(b) & (d)(2)(A); *In re Cherry*, 247 B.R. 176 (Bankr. E. D. Va. 2000); *Columbia Gas Transmission Corp. v. Mangione Enterprises of Turf Valley, L.P.*, 964 F.Supp. 199 (D. Md. 1996).

The court need not make new findings of fact. They were correct. The error occurred in the court's legal conclusions on the question of whether Mr. Rajotte incurred a new debt to Mr. Carter after Mr. Rajotte filed his bankruptcy petition and received a discharge of his debts. A post-petition debt would not be affected by the discharge and could be collected by Mr. Carter. The court concluded that Mr. Rajotte

did not incur a post-petition debt to Mr. Carter. The court now believes this conclusion was wrong.

The facts involve two transactions. Before his bankruptcy, Mr. Rajotte owed a debt referred to as the Chemex debt or loan. Mr. Rajotte's wife at the time, Marge Rajotte, guaranteed the debt. Mr. Carter, who is Marge Rajotte's brother, also guaranteed the debt. Mr. Carter ended up paying the debt and having a claim against Mr. Rajotte and Marge Rajotte for the amount he paid.

Mr. Rajotte and Marge Rajotte filed separate no asset bankruptcy cases while they were still married, and each received a discharge. They were both careful to avoid giving Mr. Carter any notice of the bankruptcy cases. Each of them believed that the failure to give notice prevented discharge of his or her debt to Mr. Carter. This was not true. Their debts to Mr. Carter were discharged despite the failure to give him notice. *Zirnhelt v. Madaj (In re Madaj)*, 149 F.3d 467 (6th Cir. 1998).

Mr. Rajotte and Marge Rajotte were divorced after the discharge of their debts to Mr. Carter. Despite the discharge of the debts, the marital dissolution agreement provided that Mr. Rajotte would hold Marge Rajotte harmless on her debt to Mr. Carter. This was the result of two factors. First, both Mr. Rajotte and Marge Rajotte were still attempting to conceal their bankruptcies from Mr. Carter. Second, Mr. Rajotte and Marge Rajotte believed that their bankruptcies did not affect their debts to Mr. Carter because they had concealed the bankruptcies from him.

The marital dissolution agreement raised the question of whether it created a post-petition debt from Mr. Rajotte to Mr. Carter that could not have been discharged in Mr. Rajotte's bankruptcy case. The court concluded that the marital dissolution agreement did not create a non-discharged, post-petition debt. This conclusion was also correct.

The court's error concerns another transaction that occurred after the bankruptcies. To secure the Chemex debt, Mr. Rajotte pledged a promissory note to him from his ex-wife, Fran. The note was secured by a mortgage on Fran's house. When Mr. Carter paid the Chemex debt, the creditor transferred the note and mortgage to him. In 1991 Mr. Carter began foreclosure proceedings on Fran's house. About the same time, Fran was attempting to collect back child support and other debts from Mr. Rajotte. Mr. Rajotte was still married to Marge Rajotte, Mr. Carter's sister. The parties worked out a three way agreement between Mr. Rajotte, Mr. Carter, and Fran. They have referred to it as the tri-party agreement. Fran paid Mr. Carter $9,087.41, and he released the mortgage on her house. She in turn released Mr. Rajotte from the debts she was trying to collect, which included a back child support debt totaling $12,253.43. The parties agreed that the mortgage on Fran's house was worth about $21,000 – the total of the amount she paid to Mr. Carter and the amount of Mr. Rajotte's debt for back child support.

The court originally concluded that this transaction did not create a post-

petition debt from Mr. Rajotte to Mr. Carter. The court's reasoning and its change in reasoning can be explained by examples.

Suppose Debtor owes Creditor a $50,000 debt secured by Debtor's real estate. The real estate is not subject to any other liens. Creditor can collect $30,000 of the debt by foreclosing on the real estate. Creditor agrees with Debtor that he will take only $20,000 and will allow Debtor to have the other $10,000 from the foreclosure proceeds. The total amount of the debt will not change. Creditor receives $20,000 from the foreclosure, and Debtor owes the balance of $30,000. The transaction converts $10,000 of the $50,000 debt from secured to unsecured. The $10,000 is not a new debt; it is only an unpaid portion of the $50,000 debt that existed before the foreclosure.

Change the example to add bankruptcy as a complication. Debtor files bankruptcy before Creditor can collect any of the $50,000 debt. The mortgage on Debtor's real estate passes through the bankruptcy unaffected. Creditor can still collect $30,000 of the debt by foreclosing on the real estate. Creditor agrees, however, that he will take only $20,000 and will give Debtor $10,000 of the proceeds. Creditor makes this agreement with full knowledge of the bankruptcy and the discharge. Does this create a post-bankruptcy debt of $10,000 from Debtor to Creditor? The discharge split the original $50,000 debt into two parts – $30,000 that was collectable after bankruptcy by foreclosure on the collateral and $20,000 that was uncollectible because it was

discharged. Creditor agreed to give up $10,000 worth of the collateral. This $10,000 of the original $50,000 debt was collectable from the collateral despite the bankruptcy discharge, but Creditor's agreement to give it up to Debtor had the effect of making it subject to the discharge. The agreement converted the $10,000 from a secured, collectable debt to an unsecured debt that was discharged and no longer collectable. The transaction did not create a new $10,000 debt.

Another change will make the example fit the facts of this case. When Creditor agreed to give Debtor $10,000 from the foreclosure proceeds, Creditor did not know about Debtor's bankruptcy. Creditor believed he could still collect the $10,000 directly from Debtor. In other words, Creditor thought the facts were the same as in the original example that did not involve any bankruptcy. He thought the transaction would convert $10,000 of the debt from secured to unsecured. He did not think he was giving up the $10,000 from the collateral and the right to collect the $10,000 from Debtor.

If Creditor knew of the bankruptcy, he still may have agreed to give Debtor the $10,000. But that was not the basis of Creditor's agreement since he did not know of the bankruptcy. The transaction rested on a false premise – Creditor's belief that he would have the right to collect the $10,000 from the Debtor. Debtor created the false premise by concealing his bankruptcy. Debtor may have believed that his concealment of the bankruptcy prevented the debt from being discharged and made him still liable to Creditor. But this does not make a difference. Debtor still created a false premise

that in fact mislead Creditor.

Contrast this with the earlier version of the example in which Creditor knew of the bankruptcy. In that version, Creditor must have known that allowing Debtor to have $10,000 from the proceeds of the collateral amounted to giving away not only the $10,000 but also the right to collect it from Debtor.

The facts of this case fit the final version of the example. Mr. Carter allowed Mr. Rajotte to use over $12,000 of the collateral's value to pay Mr. Rajotte's debt for back child support. When Mr. Carter did this, he thought he could collect the $12,253.43 from Mr. Rajotte directly. He thought this because Mr. Rajotte had successfully concealed his bankruptcy from Mr. Carter. The bankruptcy, however, would have barred collection of the $12,253.43 from Mr. Rajotte. Based on these facts, the court finds that the transaction created a new, post-petition debt from Mr. Rajotte to Mr. Carter. *See In re Mullen*, 200 B.R. 352 (C. D. Cal. 1996); *In re Breyer*, 216 B.R. 755 (Bankr. E. D. Pa. 1998); *In re Burgin*, 1991 WL 378166 (Bankr. N. D. Ohio 1991).

Without knowledge of Mr. Rajotte's bankruptcy, Mr. Carter brought suit against Mr. Rajotte in state court to collect the entire debt resulting from the Chemex transaction. This lawsuit finally provoked Mr. Rajotte and his attorneys to notify Mr. Carter of the bankruptcy. They notified Mr. Carter and his attorneys and sought to convince them that the debt had been discharged despite the concealment of the bankruptcy from Mr. Carter.

In its oral opinion, the court held that Mr. Carter willfully violated the discharge injunction found in Bankruptcy Code § 524(a). 11 U.S.C. § 524(a). Mr. Rajotte's attorneys sent Mr. Carter's attorneys a letter dated October 23, 1998 that accurately [explained] how the Chemex debt was discharged despite Mr. Carter's lack of notice. Mr. Carter did not, however, dismiss the state court lawsuit. In April 1999 Mr. Rajotte filed a motion to hold Mr. Carter in contempt for not dismissing the state court lawsuit. Mr. Carter did not dismiss the suit until May 1999 after a hearing on the motion for contempt. In its oral opinion, this court held that Mr. Carter willfully violated the discharge injunction from the time his attorneys received the letter dated October 23, 1998 until the he dismissed the state court lawsuit in May 1999.

Mr. Carter's attorney argued that this was not correct because the tri-party agreement gave rise to a post-petition debt that Mr. Carter had the right to collect. In its oral opinion, the court rejected this argument, but now the court reverses itself and finds that the tri-party agreement did give rise to a post-petition debt that could not have been discharged in Mr. Rajotte's bankruptcy.

A debtor can recover damages only for a willful violation of the discharge injunction. *See, e.g., In re Miller*, 247 B.R. 224 (Bankr. E. D. Mich. 2000); *In re Hill*, 222 B.R. 119 (Bankr. N. D. Ohio 1998). If there was a willful violation of the discharge injunction, it must have occurred because (1) the state court lawsuit sought to collect the entire Chemex debt even though it had been discharged, and (2) Mr. Carter and

his attorneys failed to *quickly* amend the state court complaint to restrict it to alleged post-petition debts or to dismiss the state court complaint and take another course of action.

The failure to dismiss a lawsuit that was commenced in violation of the discharge injunction is not necessarily a willful violation of the discharge injunction. Suppose that filing the lawsuit was not a willful violation of the discharge injunction because the creditor had no knowledge of the bankruptcy. The suit is for the collection of a debt. Unlike garnishment, attachment, or similar remedies, the lawsuit does not attempt to exert control over any of the debtor's property. The creditor learns of the bankruptcy *and* realizes the debt has been discharged. The creditor makes no attempt to pursue the lawsuit but does not dismiss it immediately. The debtor and his lawyer know this. Of course, it would be better for the creditor to dismiss the lawsuit. Nevertheless, the harm to the debtor from the failure to dismiss will usually be minimal if not illusory. *Compare In re Mims*, 209 B.R. 746 (Bankr. M. D. Fla. 1997) *with Ameron Protective Coatings Division v. Georgia Steel, Inc. (In re Georgia Steel, Inc.)*, 25 B.R. 781 (Bankr. M. D. Ga. 1982). The mere pendency of the lawsuit should not create a jackpot for the debtor or his lawyer in the form of damages, including attorney's fees, for willful violation of the discharge injunction.

The facts of this case can be contrasted to the facts of *In re Braun*, 152 B.R. 466 (N. D. Ohio 1993). In that case, the creditor knew of the discharge and ignored it by trying to collect the pre-petition discharged debt. After the fact, it

attempted to justify the lawsuit as one for post-petition conversion of its collateral. In this case, after Mr. Carter and his lawyers learned of the discharge, they may have been too slow to reach the correct legal conclusions and narrow the issues, but they did not purposefully ignore the discharge to the detriment of Mr. Rajotte. The dispute became a bankruptcy dispute over whether Mr. Rajotte owed Mr. Carter a debt that was not discharged.

Mr. Rajotte questions whether the failure to dismiss the state court lawsuit can be justified on the ground that, as it turned out, Mr. Rajotte owed a post-petition debt to Mr. Carter. Mr. Carter did not file the state court lawsuit to collect the post-petition debt, and after learning of Mr. Rajotte's bankruptcy, he continued to assert liability on the Chemex debt on the basis of arguments that were easily proved wrong. In summary, Mr. Rajotte contends that Mr. Carter and his lawyers violated the discharge injunction because they should have discovered quickly that the Chemex debt was discharged, and they cannot justify their refusal to dismiss or amend the lawsuit on the ground that it *could have been* brought to collect a post-petition debt from Mr. Rajotte, because they did not discover that argument until later and because collection of the post-petition debt was barred by the Tennessee statute of limitations (according to Mr. Rajotte's lawyers).

The state court lawsuit generated a bankruptcy dispute between the parties over whether Mr. Rajotte owed a debt to Mr. Carter that was not discharged in

Mr. Rajotte's bankruptcy. But the state court lawsuit itself was not a burden on Mr. Rajotte. The real dispute was whether Mr. Rajotte owed Mr. Carter a debt not affected by Mr. Rajotte's discharge. Mr. Carter's attorneys apparently argued – incorrectly – that lack of notice prevented discharge of the Chemex debt or that Mr. Rajotte made himself liable again by his post-petition actions. They were still asserting the right to collect the Chemex debt, not the post-petition debt arising from the tri-party agreement. Mr. Rajotte is arguing, in effect, that Mr. Carter and his lawyers should be penalized for continuing to assert Mr. Rajotte's liability on the Chemex debt on the basis of clearly incorrect legal arguments. Furthermore, according to this argument, it makes no

difference that Mr. Carter did have reasonable grounds for asserting a post-petition debt that was not discharged; the failure to let go of the Chemex claim quickly was still a violation of the discharge injunction.

Mr. Rajotte is simply complaining about the speed of Mr. Carter's attorneys in hitting on the right legal questions. First, he argues that it took them too long to hit on the question of whether Mr. Rajotte incurred a post-petition debt to Mr. Carter, and then he argues that they failed to see immediately that collection of the post-petition debt was barred by the statute of limitations, as least it was clearly barred if you believe Mr. Rajotte's lawyers are always correct. Mr. Rajotte is attempting to make Mr. Carter and his lawyers liable for willfully violating the discharge injunction by raising a dispute as to whether it applied and being slow to reach the right legal conclusions. Such a violation may be possible, but the facts of this case do not show it. The delay in dismissing or amending the state court lawsuit or taking some other course of action may have been longer than it should have been, because Mr. Carter's lawyers took too long to analyze the law, and they may have been disagreeable with Mr. Rajotte's lawyers during this time, but these facts do not create a willful violation of the discharge injunction. Lawyers must have some leeway in litigating whether the discharge injunction applies without being in violation of the injunction for continuing to litigate. The facts do not show that the delay by Mr. Carter and his lawyers in getting to the right

legal questions was so egregious that it amounted to a willful violation of the discharge injunction.

In summary, (1) Mr. Rajotte incurred a post-petition debt of $12,253.43 owed to Mr. Carter that was not discharged in Mr. Rajotte's bankruptcy case; (2) the other alleged debts from Mr. Rajotte to Mr. Carter were discharged in Mr. Rajotte's bankruptcy case; (3) neither Mr. Carter nor his attorneys willfully violated the discharge injunction imposed by 11 U.S.C. § 524, and therefore, Mr. Rajotte is not entitled to recover any damages from them.

This Memorandum constitutes findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

ENTER:

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE